South Nassau Communities Hospital *and* District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO. Cases 29-CA-7717, 29-CA-7772-1, 29-CA-7772-2, 29-CA-7815, 29-CA-8001, and 29-CA-8001-2

July 22, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 4, 1981, Administrative Law Judge Arthur A. Herman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, South Nassau Communities Hospital, Oceanside, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Add the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any references to the reprimands issued to employees Miller and Saleeby on February 7, 1980, and any reference pertaining to the discharge of employees Dawson and Tomel, and notify them in writing that this has been done and that evidence of these unlawful disciplinary actions will not be used as a basis for future discipline against them."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT assign employees to more arduous and less agreeable job tasks to induce said employees to abandon their support for District 1199, National Union of Hospital and Health Care Employees, Retail, wholesale and Department Store Union, AFL-CIO, or any other labor organization.

WE WILL NOT issue written reprimands to employees for overstaying lunch periods be-

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Although the Administrative Law Judge failed to state specifically that he was crediting the testimony of employee Tomel concerning Manager Marshall's statements at a meeting on January 31, we find that his ultimate conclusion that Respondent violated Sec. 8(a)(1) by Marshall's statements establishes that he was implicitly crediting Tomel's testimony rather than Marshall's.

[2] We agree with the Administrative Law Judge that Respondent engaged in unlawful discrimination when, *inter alia*, it issued warning letters to employees Miller and Saleeby for overextending their lunch breaks, assigned Miller to more onerous work, and required Miller to produce a doctor's note after taking a day of sick leave. Although the Administrative Law Judge found that Respondent intended to retaliate against employees' union activities by each of the foregoing acts, he failed to state expressly in ultimate findings and/or conclusions of law that such conduct violated Sec. 8(a)(3) as well as Sec. 8(a)(1) of the Act. We hereby make such findings and conclusions.

In addition, we note that the Administrative Law Judge erred by stating in reference to Miller's doctor's note requirement that "[t]here is not one shred of evidence produced by Respondent to show that Miller was ever told, throughout all the years of her employment, that the Hospital was dissatisfied with her attendance record." In 1977, Miller was requested a doctor's note for having been absent in excess of 3 days and her May 31, 1979, performance appraisal form rated her attendance as "poor." We find, however, that these remote instances of rebuke in a 7-1/2-year history of poor attendance by Miller do not rebut the inference of antiunion discrimination and disparate treatment which arises from the precipitate imposition of the doctor's note requirement for a single day's absence. We also deem particularly significant Respondent's failure to explain satisfactorily why it requested a note from Miller on February 14, 1980, the day after she leafleted employees on the Union's behalf, rather than on the first day she returned to work after her February 11 absence.

cause said employees joined or assisted District 1199.

WE WILL NOT require employees who are sympathetic to District 1199, or any other labor organization, to produce physicians' notes for all future absences.

WE WILL NOT refuse to grant the proper number of vacation days to employees who support District 1199.

WE WILL NOT threaten you with reprisals because you joined or assisted District 1199.

WE WILL NOT express to you the futility of your support of District 1199.

WE WILL NOT discharge you because of your activities on behalf of and sympathies for District 1199 or any labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of any of your rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL offer Helen Dawson and Raymond Tomel reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

WE WILL expunge from our files any references to the reprimands issued to employees Miller and Saleeby on February 7, 1980, and any references pertaining to the discharges of employees Dawson and Tomel and WE WILL notify them that this has been done and that evidence of these unlawful actions will not be used as a basis for future discipline against them.

WE WILL make whole Helen Dawson, Raymond Tomel, and Eiline Miller for any loss of earnings they may have suffered by reason of the discrimination against them, with interest.

SOUTH NASSAU COMMUNITIES HOSPITAL

DECISION

STATEMENT OF THE CASE

ARTHUR A. HERMAN, Administrative Law Judge: On January 21, 1980, District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, herein called the Charging Party or Union, filed an unfair labor practice charge in Case 29-CA-7717, and on January 25, 1980, filed an amended charge, alleging that South Nassau Communities Hospital, herein called the Respondent or the Hospital, had committed unfair labor practices within the meaning of the National Labor Relations Act, as amended, by discharging employee Helen Dawson for engaging in union activities. On February 11, 1980, the Union filed additional charges in Cases 29-CA-7772-1 and 29-CA-7772-2 alleging that the Hospital unlawfully discharged employee Raymond Tomel because he engaged in union activities, and coerced employees Eiline Miller and Donna Saleeby in the exercise of their Section 7 rights because they supported the Union. On February 27, 1980, an additional 8(a)(1) charge was filed by the Union in Case 29-CA-7815 alleging that Respondent threatened its employees that it would never recognize the Union. On April 24, 1980, an order consolidating cases and complaint and notice of hearing issued incorporating all the charges thus far filed and alleging all of the matters heretofore mentioned. On May 12, 1980, the Union filed a charge in Case 29-CA-8001 alleging the constructive discharge of Eiline Miller because of her union activities, and on May 16, 1980, the last charge involved in this proceeding was filed by the Union in Case 29-CA-8001-2 alleging the discharge of Glenn Siegel for his union activities. Thereafter, on June 30, 1980, an additional order consolidating cases and complaint and notice of hearing issued alleging the discharge of Siegel and certain 8(a)(1) conduct.[1] And, on August 19, 1980, the Regional Director for Region 29 of the Board issued an order consolidating cases thereby combining the two complaints for hearing.

Respondent duly filed answers to the complaints denying the commission of unfair labor practices.

Upon due notice, a hearing was held before me in New York City on September 8, 9, 10, 15, 16, 18, 19, 22, and 23, 1980. Briefs were filed by the General Counsel and Respondent and have been duly considered.[2]

On the entire record in the case, the briefs, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with its principal office and place of business in Oceanside, New York, is engaged in operating a nonprofit hospital and providing medical and other health related services. Respondent, in the course and conduct of its business operations, annually derives gross revenues in excess of $250,000, and annually purchases and receives medical supplies and other goods valued in excess of $50,000 directly from suppliers located outside the State of New York. The complaints allege, the Hospital does not deny, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale, and Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

[1] The complaint does not allege Miller's termination as an unfair labor practice. See fn. 45, *infra*.

[2] The Union, the Charging Party herein, made no appearance at the hearing.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Sometime during December 1979, the Union, for the third time since 1972, engaged in a campaign to organize Respondent's employees. Eiline Miller, a senior technician in the special chemistry laboratory, had received through the mail a few union authorization cards from Jeff Cohen, a union organizer, and during the first week in January 1980,[3] Virginia Roth, a laboratory technician, gave Miller about 50 additional cards. Miller distributed the cards and union leaflets to employees in the Hospital's employee cafeteria, the laboratory lounge, and the ladies' locker room. Specifically, on January 17, Miller handed out union literature and cards to employees in the cafeteria on her lunch break in full view of several acknowledged supervisory personnel. Also, on January 31, Miller, along with Ray Tomel, an X-ray technologist, leafleted the employees in the cafeteria on their lunch break and, on February 6 at 6:30 a.m., before reporting for work, Miller and Tomel leafleted in the cafeteria.[4] It is also Miller's unrefuted testimony that she continued to hand out-cards and leaflet employees on many other occasions into May when she was no longer employed by Respondent.[5] In fact, it is her testimony that, on May 2, she, Cohen, and Glenn Siegel, an inhalation therapist, leafleted employees at the main gate leading to the hospital. In addition to the three employees already named, Donna Saleeby, an employee, testified that she also distributed union literature on January 17 and February 7 in the employee cafeteria and was observed doing so by supervisory personnel. While Miller states that she attended about six to eight union meetings at a pub away from the premises, and Tomel says that he met with Cohen on a few occasions at the same pub, there is no evidence presented as to the number of employees who attended these meetings. In fact, except for the incidents of union activity related above and that concerning Helen Dawson, below, the record is void of any other union activity.[6] With this as background, we turn now to the various acts of alleged discrimination by the employer to determine to what extent, if any, such union activity entered into the thought processes of management when it decided, as alleged, to inflict a variety of penalties against various employees.[7]

B. *The Discharge of Helen Dawson*

Dawson, a medical technologist in the chemistry laboratory, was discharged on January 10. She had worked for the Respondent for 2 years before she was discharged. During that 2-year period, according to Respondent, Dawson had been counseled and reprimanded on a few occasions. Specifically, in September 1979, Dr. Ahmed Khapra, Respondent's director of pathology, found out that Dawson had not completed her quality control report. According to Khapra, it was absolutely essential that the employees finish the quality control before starting their work, and any failure to do so was a serious infraction of the rule. Upon learning of Dawson's failure to complete the report, Khapra became upset, discussed it with Dawson, and told William Ulrich, the laboratory manager, to write up the discussion. Also in September 1979, Dawson had received an oral counseling from Khapra for having returned late from a lunch break. Such action causes an understaffing of the department, and Respondent viewed this as a potentially hazardous situation. In December 1979, Dawson was questioned by Khapra regarding her signing her timecard with incorrect hours worked, and was told by Khapra to be careful in the future.[8] And on the day that she was discharged, January 10,[9] Dawson invited a nonemployee to have lunch with her in the employee cafeteria and supplied her with a laboratory coat to gain entrance because nonemployees were not permitted in the cafeteria. The ruse was detected by management, however, and the nonemployee was asked to leave.

Dawson testified that, during the first week in January, she had been given two union authorization cards by Miller, one of which she signed and sent to the Union. On January 9, after Dawson returned from lunch, she checked her afternoon schedule as it existed up to that point, and, finding it to be light, she went to the lounge for her afternoon break. According to Dawson, Jerona Johnson, a blood bank technician, was seated at the table in the lounge having coffee, and Dawson sat down beside her.[10] Shortly thereafter, Miller came in and mentioned that the Union was trying to organize the employees. With that, Dawson asked Johnson if she wanted a card, and, upon receiving an affirmative response, Dawson handed Johnson the one remaining card she had, and Johnson put the card in her pocket.[11] It is the unrefuted testimony of Dawson that this constituted the one and only act of union activity that she engaged in.

Johnson testified that the above incident did not occur in the lounge; it occurred in the blood bank where Johnson worked. Johnson described the blood bank as a rectangular room with one entrance. Joyce Robinson, a fellow blood bank technician, worked at a counter table to the left of the entranceway, Johnson worked at a counter table in the left rear area of the room, and Her-

[3] All dates herein are in the year 1980 unless otherwise indicated.

[4] Tomel also testified that he distributed authorization cards to fellow employees after work, during breaktime in the lounge, and in the locker room of the radiology department.

[5] Miller resigned in April.

[6] Helen Dawson's involvement will be discussed *infra.*

[7] I am firmly of the belief, and Respondent does not deny, that the Union's attempt to organize Respondent's employees was open and notorious, and well known to Respondent. Leafleting of employees by union organizers was taking place outside the entrances to the hospital, and Miller, Saleeby, and Tomel testified, without contradiction, that they were observed by supervisory personnel leafleting employees in the cafeteria, during the months of January and February.

[8] It seems that Dawson usually worked from 7 a.m. to 3 p.m. On that particular day, she arrived at the hospital at 7:30 a.m. and worked until 3:30 p.m. However, she inadvertently signed the timecard 7 a.m.–3 p.m.

[9] The exit interview occurred in the afternoon.

[10] The lounge is entered from the laboratory in which Dawson and Miller work. It is approximately 15 by 20 feet and is used as a rest area during breaktime. The lounge leads into the men's and women's lockers. It is not used as a work area and no patients are permitted in the lounge. Johnson works in the blood bank which is adjacent to the chemistry laboratory. Blood bank employees use the same lounge as the lab employees.

[11] Miller confirms Dawson's testimony.

mite Theodule, their supervisor, performed her work at the right of the entranceway.[12] According to Johnson, it was around 2 p.m. on January 9, while she was doing a cross-match,[13] when Dawson came alongside her and asked Johnson in a low voice if she wanted a union authorization card.[14] When Johnson replied in the negative, Dawson slipped a card into Johnson's pocket and walked out of the room. Whereupon Johnson called Theodule and asked her to look in her pocket. Robinson came over at the same time when Theodule pulled the union card from Johnson's pocket. Johnson told them that Dawson had just put it there, and Robinson volunteered the information that just a few minutes earlier, while she had been working at the computer terminal, which is also adjacent to the chemistry laboratory, Dawson had asked her if she wanted a card but Robinson refused and Dawson walked away.[15] Theodule then went and reported the incident to Dawson's supervisor, Marion Kilfoyle. That afternoon, Johnson and Robinson were called to Khapra's office and questioned about the Dawson incident. Both were asked to give written statements and voluntarily did so.

The next day, January 10, in the afternoon, Dawson was called in to John Sikoryak's office[16] and discharged for violation of Respondent's no-solicitation rule.[17] Dawson testified that she was familiar with the no-solicitation rule, and that she knew that employees were not allowed to give out union literature in the laboratory area.

The General Counsel contends that the Employer's discharge of Dawson was violative of the Act because the conduct she engaged in was protected by the Act. This contention is predicated on the factual explanation that the solicitation occurred in the lounge, a nonwork area, during nonwork time. In the alternative, the General Counsel argues, without conceding the point, that, even if the solicitation took place in the blood bank, discharge was still violative of the Act because it showed disparate enforcement of the no-solicitation rule in light of the fact that solicitations for other purposes occurred frequently on the Hospital's premises during working hours in work areas.[18]

Respondent justifies the discharge by insisting that the solicitation took place in the blood bank, a work area, during worktime, and it draws a distinction between such solicitation which it contends causes disruption of work, and what it calls "beneficent" solicitation which inspires cooperation among employees.

In my opinion, Respondent's contention as to where the solicitation took place is not supported by the credible evidence. In the first place, in observing the demeanor of the witnesses while they were testifying, I found Dawson and Miller to be impressive witnesses, making an honest effort to recount the facts as they remembered them, where Johnson and Robinson tended to be evasive and confusing. Secondly, Dawson testified that she was aware of the fact that "you are not allowed to give out Union stuff in the lab area." And since it was just as easy to hand out a union card in the lounge area, it would make no sense to force a card on an unwilling employee in the blood bank, a work area, especially, in full view of another employee and supervisor. Also, it is not believable that Dawson would pass up the opportunity of forcing the card on Robinson at the computer terminal just minutes prior to allegedly forcing the card on Johnson. Under all circumstances, I conclude that the union activity engaged in by Dawson occurred in a nonwork area on nonworktime, and, as such, was a protected activity. And any attempt by Respondent to assign other reasons for the discharge of Dawson must be rejected. It is interesting to note that Respondent offers no explanation for its instantaneous action against Dawson on January 10, without ever giving Dawson an opportunity to be heard. Yet, on at least two prior occasions as testified to by Dr. Khapra, and as stated *supra*, Dawson engaged in conduct worthy of discharge, but was only reprimanded after consultation. All in all, it is my conclusion that Respondent discharged Dawson because of her union activities, albeit such activity was limited to only one incident, in violation of Section 8(a)(3) and (1) of the Act.

C. *The Discharge of Raymond Tomel*

After having trained for 2 years in Respondent's radiology department, Tomel was employed by Respondent in December 1974 as an X-ray technologist. It was his duty to provide diagnostic radiographs for interpretation by radiologists.[19] When a patient enters the Department of Radiology, he usually has with him a requisition signed by the patient's physician which specifies clinical information regarding the patient and the particular radiologic examination requested. After the X-rays are taken, the patient is brought back outside the room to wait while the films are developed and checked. The X-rays are sent to the darkroom for developing by either an X-ray technician or the technologist himself. In the event the films are capable of proper radiological interpretation, the patient is returned to his room, or, if he is an outpatient, he is sent home. If the X-rays do not ade-

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[12] Nothing obscures the view of any of the employees towards the others.

[13] Before a donor's blood is administered in a transfusion, it must be cross-matched with the recipient to determine if they are compatible.

[14] Both Robinson and Theodule were present in the room at the time.

[15] Dawson denies that she ever asked Robinson if she wanted a union card.

[16] He is Respondent's director of personnel.

[17] Respondent's no-solicitation rule appears in the Hospital's employee handbook which is distributed to every employee. It reads as follows:

> Solicitation by an employee of another employee is prohibited in patient care areas or while either the person doing the soliciting or being solicited is on working time.
>
> Distribution of advertising material, handbills, or other literature is prohibited in patient care areas or while either the person doing the distributing or receiving the material is on working time.

Neither the complaint alleges nor does the General Counsel contend that the no-solicitation rule is invalid, and I find that the above rule is presumptively valid.

[18] The record is replete with uncontroverted testimony that employees solicited other employees, during working hours in work areas, for contributions to forthcoming marriages of employees, employee birthdays, and birth gifts. Also, invitations to tupperware parties were commonplace, and sales of candy and other products were engaged in. At no time, and Respondent concurs, was an employee ever discharged for participating in these solicitations.

[19] At the time of Tomel's employment, Respondent employed 11 full-time, 7 part-time, and several per diem technologists.

quately demonstrate what the radiologist is looking for, he will request additional pictures be taken.

Tomel testified that, on January 31, he and Miller distributed prounion leaflets to employees in the cafeteria during lunchtime, and that Les Marshall, the manager of the department of radiology and Tomel's supervisor, came by him and glanced over his shoulder to see what he was distributing.[20]

On Wednesday morning, February 6, at or about 6:40 a.m., Tomel and Miller leafleted again in the cafeteria until about 7:20 a.m. Tomel testified that he then went to work and, at or about 9 a.m., Marshall and Rodzenko came through the department greeting the employees. They greeted Tomel and, as they passed, Tomel heard Marshall say to Rodzenko, "He's the one."[21]

Between 11 a.m. and noon that same day, Tomel was assigned to take X-rays of two patients. Three chest X-rays were taken of the first patient; when developed by Tomel the first X-ray came out too dark, and the second and third adhered to each other when they came through the processor, making them worthless because they overlapped. This necessitated the retaking of the X-rays, which was undesirable since the patient was of childbearing age. The second patient required a skull series of four X-rays, and the first two films came out on the light side and had to be repeated. That afternoon, at or about 3:30 p.m., Tomel was called into Sykoriak's office and discharged. Respondent contends that Tomel was negligent in the taking and developing of the X-rays, and that such negligence in patient care cannot be condoned. Therefore, it had no choice but to terminate Tomel. The General Counsel contends that, although the incidents regarding the X-rays occurred, it does not concede that Tomel was negligent, and lays the termination squarely on Tomel's union activity.

Inasmuch as there is no factual dispute regarding the actual occurrence of the defective X-rays, I do not find it necessary for me to assess the evidence for the purpose of determining whether or not Tomel was negligent in his operation of the X-ray machine or the processor that developed the X-rays.[22] Certainly, an employer has a right to draw his own conclusion as to the competency of an employee, and terminate that employee if he feels that he had not performed his duties properly. However, if the incident relied on by the employer is merely an excuse to rid himself of an employee, because the employer's ulterior motive is the employee's union activity, then the discharge is violative of the Act, and the question of negligence would have nothing to do with it.

In examining the evidence in this case, I must come to the conclusion that it was Tomel's union activity that prompted him termination, and not the earlier incidents that occurred on the discharge date, February 6. In reaching this conclusion, I am persuaded by several factors. Tomel had been employed as a technologist by Respondent for over 5 years, and no evidence was introduced by Respondent to show that they were ever dissatisfied with his work. Yet, two incidents occur back to back on February 6, and without even calling Tomel in to offer an explanation, he is summarily discharged. All this in the face of unrefuted evidence that, in the normal course of a hospital's operation, X-rays have to be repeated from time to time in order for the radiologist to give a proper diagnosis. Why else would the Respondent employ two quality control men and station them at the X-ray processor? In fact, evidence was offered to show that retakes of X-rays was standard operating procedure, and, although Respondent's record was better than other hospitals, it still had a 6-percent retake factor.[23]

Also, while the Hospital's rules of conduct provide that an employee's negligence could result in discharge, no evidence was offered by Respondent to show that it was ever done in the radiology department. Such disparate treatment of Tomel could have only one explanation. Respondent had just learned one short week before that Tomel was a union adherent, and so, under the guise of negligent conduct, it sought to terminate his employment.

Under all of the circumstances, I find that Respondent's discharge of Tomel was motivated solely by his union activity. This is based upon Tomel being a competent employee for 5 years who had never been disciplined and whose union activities had become known to Respondent just a few days earlier. The timing is most convincing.[24] Such immediate action against Tomel without oral or written reprimand for the alleged negligence allows me to infer that Respondent's motive was discriminatory and unlawful.[25] Accordingly, the discharge of Ray Tomel violates Section 8(a)(3) and (1) of the Act.

D. *The Discharge of Glenn Siegel*

The General Counsel contends that Siegel was discharged in May 1980 for being a known union adherent and playing an active role in the Union's organizing campaign. Respondent, on the other hand, argues that the discharge was not unlawfully motivated, but that it resulted from its enforcement of a long-established policy of terminating employees who willfully falsify their job application.

On December 12, 1979, Siegel filled out an application for a job as a respiratory therapist in Respondent's Hospital.[26] In answering the question pertaining to prior employment and the reason for leaving, Siegel omitted mentioning that he had previously been employed by Flushing Hospital as a respiratory therapist from May 7 to July 6, 1979. Notwithstanding this omission, Siegel signed his name on the application below a statement that said, "The above answers are correct and complete.

[20] Although Marshall was called by Respondent to testify, he was not questioned regarding this incident, and so I find that Respondent had knowledge of Tomel's union activity as of January 31.

[21] Although Rodzenko testified that he saw his attorney and gave an affidavit to a Board agent on the morning of February 6, neither he nor Marshall deny that this incident occurred, and so it stands unrefuted. I therefore credit Tomel as to what transpired.

[22] The record is replete with testimony from both sides as to the procedures to be followed in taking X-rays and developing them.

[23] This was revealed through a study conducted by the DuPont Company.

[24] *Southern Paint & Waterproofing Co., Inc.*, 230 NLRB 429, 433 (1977).

[25] *The Halloran House*, 249 NLRB 759 (1980).

[26] Siegel had worked previously at the Hospital as a student from March to August 1978.

. . . I understand employment is conditional upon receipt of satisfactory references and any FALSIFICATION WILL LEAD TO IMMEDIATE DISCHARGE. . . ." At the hearing, Siegel admitted that he intentionally withheld information concerning Flushing Hospital for fear that Respondent would not hire him.[27]

About a week after Siegel filled out the application, he received a call from Sykoriak offering him a job as a technician on the night shift. Siegel rejected the offer on the grounds that he was a therapist not a technician, and he did not want to work the night shift. Sykoriak contacted Siegel again at or about the end of December 1979, and offered Siegel an evening position as a therapist. Siegel accepted and started working for Respondent on January 18, 1980. The uncontroverted testimony of Siegel is that during his employment at the Hospital he did not receive any reprimands, disciplinary warnings, nor other complaints about his work performance.

Shortly after he started on the job at the Hospital, Siegel began handing out union authorization cards to employees; he left Union leaflets in the cafeteria and handed them out to employees outside the Hospital; and he discussed the Union with other employees at lunch and supper.[28] Some time in March, Siegel was transferred to the day shift.

Siegel testified that on May 6 he wrote a letter addressed to Michael Rodzenko, the Hospital's executive director, and brought it to Rodzenko's office and left it with his secretary; duplicate originals were mailed to the Board and to the Union. Also, typewritten copies were made and distributed by the Union.[29] The letter identifies Siegel and puts the Hospital on notice that he is a prounion activist. In one pertinent part Siegel writes, "I worked in an 1199 hospital in the past." Rodzenko brought the letter to Sikoryak to place in Siegel's personnel file. Sikoryak read it and wondered about the quoted phrase above, not knowing which hospital Siegel had in mind. Being admittedly curious, Sikoryak contacted Bruce Witz[30] and asked Witz if any of the hospitals listed on Siegel's employment application were organized by Local 1199. Witz testified that, since he was not sure of the status of New York Hospital, one of the hospitals that Siegel had listed on his application, he contacted his counterpart there and was told that New York Hospital was not affiliated with Local 1199. However, upon examination of Siegel's job application at New York Hospital, it was revealed to Witz that Siegel had previously worked at Flushing Hospital, a fact which had been left off Siegel's application when he applied for his position at South Nassau. Witz relayed this information to Sikoryak, who in turn advised Rodzenko. After confirmation of Siegel's employment and termination from Flushing Hospital was received by Rodzenko, he recommended termination of Siegel for falsifying his employment application at the Hospital. And so Siegel was discharged by Sikoryak on May 12.

In attempting to justify the discharge of Siegel, Respondent introduced evidence to show that on two other occasions it had discharged employees for falsification of their employment applications. In both cases the individuals had failed to state that they had been discharged from former positions, but reference checks revealed the truth, and both were terminated at the Hospital for falsification of their employment applications. In the instant case, Siegel purposely withheld information regarding his employment at Flushing Hospital, and, therefore, no routine reference check could possibly reveal it. It was only after Siegel himself triggered the inquiry by stating in his letter to Rodzenko that he had worked for "an 1199 hospital" that the falsification of his employment application came to light. Although the General Counsel would have me conclude that Respondent's reason for Siegel's discharge was pretextual, and that the true reason for his discharge was his union activity, I am unable to do so. If not for Siegel's own revelation, no inquiry would have materialized. In fact, by Siegel's own admission his union activity was open and notorious from shortly after he started on the job back in January, and therefore well known to Respondent for several months before his discharge. Yet, he continued in Respondent's employ for those several months until he himself caused the inquiry that resulted in his discharge.

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board has set forth a new test of caution for cases alleging violations of Section 8(a)(3) of the Act. The test provides that the General Counsel make a *prima facie* showing sufficient to support the inference that protected activity was a motivating factor for the discharge. At that point, the burden shifts to the respondent to demonstrate that the discharge would still have occurred even in the absence of the protected conduct. It is my belief that Respondent here has amply met that burden. It has explicitly shown that it will not tolerate falsification of employment applications by showing the discharges of two other employees for that very reason, and the General Counsel could produce no evidence to rebut such proof. Although there are other aspects of this case, as described above, which lend themselves to the belief that Respondent discriminated against employees for their union activity, I do not join with the General Counsel in assessing Siegel's discharge in such light. Under the circumstances, it is my opinion that Respondent has demonstrated that Siegel's discharge would have taken place even in the absence of any protected activity, and for that reason I find and conclude that this allegation of the complaint must be dismissed.[31]

E. *The 8(a)(1) Allegations*

The consolidated complaints cite eight separate allegations of violations of Section 8(a)(1) of the Act. Five[32]

[27] Siegel stated that he omitted Flushing Hospital from among his employers because Flushing Hospital's employees were represented by a union, and if that fact were known to Respondent he would not get the job.

[28] Siegel testified that he had known Jeff Cohen, the union organizer, for about 10 years, and before he applied for the job at the Hospital, he told Cohen that he would help organize the employees for the Union once he started to work there.

[29] See G.C. Exhs. 14 and 15.

[30] The Hospital's technical director for the respiratory therapy department.

[31] See *Service Garage, Inc.*, 256 NLRB 931 (1981).

[32] One of the five allegations involves two separate incidents to be discussed, *infra*.

of these relate to incidents involving Eiline Miller,[33] and three refer to violative statements made at various times by supervisory personnel, Lester Marshall, Michael Rodzenko and Bruce Witz to groups of employees.

According to the testimony presented at the hearing, Miller appeared to be the leading protagonist for the Union. As stated above, beginning in early January 1980, she was the principal distributor of union authorization cards and leaflets to employees in nonwork areas of the Hospital. And, as found by me earlier, Respondent was well aware of her union activities. The question is whether this knowledge played any part in the discipline and other actions taken against Miller by Respondent in the incidents herein related.

The first incident involving Miller occurred during the middle of January 1980. On or about January 15, 1980, Miller received a written warning notice[34] for having received T-3 reagents from a manufacturer which had a short shelf life. The evidence established that, although the Hospital had no written policy stating what the minimum shelf life should be, it was the practice of the manufacture to send these reagents to the Hospital that had a minimum shelf life of 45 days. The written warning notice to Miller pointed up the fact that Miller had accepted reagents with only a 32-day shelf life, and that as a result they were not usable during the period for which they should have been available. While it is true that Miller herself brought to the attention of her supervisor, William Ulrich, the inutility of the reagents, this does not excuse the initial act of acceptance on her part. Inasmuch as there is no dispute as to the facts involved in this incident, and Respondent has presented sufficient evidence to show that other employees similarly situated have been equally reprimanded, and I find no causal relationship between this incident and Miller's union activity,[35] I shall dismiss this allegation of the complaint.[36]

On Friday, January 18, Miller and Saleeby met Jeff Cohen, the union organizer, in the Hospital coffeeshop for lunch. Cohen gave Miller a large envelope filled with union material. Later that afternoon Ulrich told Miller that starting Monday, January 21, she was to replace Gladys Byrne, a student, on the blood pickup team and take blood specimens from the patients each morning, in addition to performing her regular duties as a senior lab technician. Prior to the commencement of this task, Miller's hours at the Hospital were 8 a.m. to 4 p.m. As a member of the blood pickup team, her hours changed to 7 a.m. to 3 p.m.[37] Miller continued to perform blood pickup chores on a daily basis until she resigned her job at the end of April. According to Miller, she had performed blood pickup work a few years back, but then only once a week. Ulrich testified, in response to my questions, that the selection of the blood pickup team was basically the responsibility of Shirley Kent, the hemotology section head; that each week on Wednesday, she submits a copy of her pickup schedule to Ulrich for the following week; that the total number of employees on the team varies from 8 to 10; that there is difficulty in staffing the team because it depletes other departments; and, although all 55 technicians are fair game to be placed on the schedule, selection is usually limited to employees in the chemistry and hemotology department, whose combined number is about 15. Ulrich also stated that Miller was chosen to replace Byrne because of complaints received about the latter's work.

The General Counsel contends that the assigning of Miller to the blood pickup team constituted an unlawful reprisal against her because she had been involved in union activities. Respondent claims that Miller replaced Byrne because of the unavailability of employees who could be spared.

It is my view that the General Counsel's contention is correct. The record and my findings above that Respondent had knowledge of the fact that Miller was a leading union adherent, and the timing of this onerous assignment following closely on the heels of Miller's union activity just 1 day earlier in the cafeteria, leave no doubt in my mind that Respondent's action was geared to discourage employees from joining or assisting labor organizations and therefore violative of Section 8(a)(3) and (1) of the Act. I do not believe that Respondent gives a valid, reasonable explanation of how Miller was chosen to replace Byrne sufficient to rebut the *prima facie* case presented by the General Counsel. While senior technicians may have been used once a week or on occasion to work on the blood pickup team, the record is void of any evidence to show that any senior technician, other than Miller, was assigned on a daily basis with no promise of relief in the forseeable future. Respondent's own testimony, through Ulrich, seemed to reflect the fact that, while schedule changes were a weekly procedure, only students worked on the blood pickup team with some degree of permanence; certainly not a senior technician of Miller's caliber. Absent some reasonable explanation as to why only Miller, a senior technician, was assigned as a permanent substitute for a student, and considering that her assignment followed closely on the heels of her activity as a key union organizer, a fact well know to Respondent, the inference is warranted, and I find, that the assignment was because of Miller's union activity. As was stated by Administrative Law Judge Fitzpatrick in *Lowery Trucking Company*, 200 NLRB 672, 677 (1972), "This was prohibited discrimination even though there is no evidence that [Miller] was disadvantaged thereby, and I find that in so discriminat-

[33] Donna Saleeby is also named in one of these allegations.

[34] The disciplinary policy of the Hospital is a three-step procedure. First, there is oral counseling; second, there is a written warning notice; and third, suspension or withholding of increments or termination.

[35] Miller testified that she gave out authorization cards to only three employees prior to January 15, and that, on January 15, she left a stack of union literature in the lab lounge before work. There is no testimony that she was observed by management personnel on either occasion. By her own admission, Miller's first public exposure of her union activity occurred on January 17 when she handed out union literature and cards to employees in the cafeteria.

[36] The fact that Respondent chose to bypass the first step of its disciplinary policy and proceed with the second merely emphasizes to me the gravity with which it viewed this transgression.

[37] Miller testified that, because of the additional duties, she was compelled to work about 5 hours' overtime each week in order to keep current with her regular work.

ing against [her] Respondent committed an unfair labor practice within the meaning of Section 8(a)(3) of the Act."

The third incident of alleged disciplinary action taken against Miller also included Saleeby and occurred on February 7. It seems that, sometime back in September 1979, Miller, Saleeby, and Dawson were 15 minutes late in coming back from lunch, and were orally reprimanded for this infraction of a hospital rule. On February 7, at or about 3 p.m., Miller was called into Ulrich's office and told that he was writing her up for taking an extended lunch period and he handed her a written warning.[38] Saleeby was also presented with a written warning. On February 8, a third employee, Jackie Fass, was given an oral reprimand for the same offense.[39] Miller and Saleeby contend that it was a common practice at the Hospital, engaged in by employees and supervisors alike, to combine lunch periods and afternoon break time, and that the Employer was well aware of the practice; but that because Miller and Saleeby were known union activists, Respondent was coercing them in this regard. Respondent claims that, inasmuch as similar punishment was handed out to Fass, an employee who was not actively supporting the Union, and other employees were also disciplined for overstaying their coffeebreaks,[40] the action taken against Miller and Saleeby was not discriminatory and therefore not violative of the Act. Fass testified that she heard about the punishment meted out to Miller and Saleeby on the night of February 7, and proceeded to Ulrich's office first thing on the morning of February 8 to find out if she were being written up. It is her uncontroverted testimony that Ulrich assured her that she was "doing a fine job" and that she was "not involved with anything" and "that they [the Administration] were looking at certain people." Fass impressed me as a forthright witness who told the truth without any personal desire to favor either party, and it is for that reason that I conclude, from the remarks attributed to Ulrich and not denied, that Miller's and Saleeby's punishment was directly related to their union activity. Accordingly, I find that Respondent coerced Miller and Saleeby within the meaning of Section 8(a)(1) of the Act.

Respondent's employee handbook provides that "after 3 or more consecutive sick days, a note from a physician is required; and depending upon circumstances, a note may be required for each absence.[41] The handbook also provides that employees with a minimum, of 1 year of service shall be permitted 11 days' sick leave annually with pay. The record shows that, during the 7-1/2 years that Miller worked at the Hospital, she exceeded the 11 days' sick leave on three occasions: 1976, 1977, and 1979.[42] On February 11, Miller took her first sick day in 1980; on February 13, Miller leafleted employees in the cafeteria with union literature and, on February 14, Ulrich called Miller to his office and requested that she bring a doctor's note for her absence on February 11. The General Counsel contends that Ulrich's actions were motivated by Miller's union activity, citing the fact that although Miller had been on sick leave for approximately 90 days during her 7-1/2 year tenure at the Hospital, all prior to her first engaging in union activity, she had never been requested to produce a doctor's note; whereas, following her first day of sick leave in 1980, the year she became active on behalf of the Union, she is harassed by Respondent for a doctor's note. Respondent countered by attempting to show that Miller's frequent absences interfered with the proper functioning of her department and had to cease. In addition, Respondent introduced evidence to show that other employees, not involved in union activity, had been disciplined for excessive absences. In analyzing the testimony, I must reject Respondent's contention. As pointed out by the General Counsel, in each instance involving the other employees each had been orally counseled about his absentee record and given fair warning of the consequences. This was not done in Miller's case. There is not one shred of evidence produced by Respondent to show that Miller was ever told, throughout all the years of her employment, that the Hospital was dissatisfied with her attendance record. Even her performance appraisal form dated 4-5-77 (Resp. Exh. 3) has the box "GOOD" checked next to the title "ATTENDANCE," despite the fact that on page 2 of the form reference is made to her attendance as being "erratic presumably due to sickness." Under the circumstances, I must conclude both from the timing of Respondent's request for a doctor's note and its discriminatory treatment of Miller in this regard that Respondent was motivated solely by Miller's union activity and thus violated Section 8(a)(1) of the Act.

The next to last alleged violation of Section 8(a)(1) of the Act involving Miller requires very little comment. The General Counsel contends that Respondent, by Khapra, "imposed more onerous working conditions upon its employee, Eiline Miller, by ceasing to speak with her." The evidence on this point is conflicting. Miller claims that, prior to the end of February, Khapra would engage in pleasantries with her on a daily basis and would always discuss work-related problems; however, after Khapra became aware, at the end of February, that Miller was going to testify at Dawson's unemployment insurance hearing, he ceased talking to her. Khapra testified that, as far as he was concerned, it was business as usual, and he was not aware of any unusual aloofness that he engaged in toward Miller. Inasmuch as the allegation involves the alleged inaction of an individual rather than the commission of an overt act, thus involving the state of mind of both parties toward the relationship, I credit both versions but I cannot find a violation of the Act. In any event, assuming the condition complained of did exist, I do not find that it rises to the level of a more onerous working condition and, therefore, I shall dismiss this allegation.

And finally, we come to the last allegation pertaining to Miller. The General Counsel alleges that Respondent refused to grant Miller the proper number of vacation days because of Miller's union activity. The parties stipu-

[38] As stated above, Miller had leafleted employees on the preceding day and Saleeby had done the same on February 7 in the cafeteria.

[39] Respondent contends that this was Fass' first offense.

[40] See Resp. Exh. 40 A-D. It is interesting to note, however, that these exhibits are all dated 1/31/78, more than 2 years prior to the current incident.

[41] Resp. Exh. 2

[42] Resp. Exh. 21.

lated on the record that in 1977 Miller took one vacation day more than she was entitled to, and that in 1978 and 1979 she was permitted to take the full complement of vacation days without having to pay back the one day from 1977. The evidence further establishes that on April 14, 1980, Miller requested 4 days' vacation leave,[43] and the payroll clerk advised her that she would get back to Miller after she checked the records; on April 21, Miller was advised that, because of the extra day that she had taken in 1977, she was now entitled only to 3 days' vacation; Miller resigned her employment on April 27,[44] effective April 28, 1980.[45] The General Counsel asserts that Respondent, by not exacting the day Miller owed for 1977 in 1978 or 1979, condoned the taking of the extra day, but that when Miller became a union activist in 1980 it retaliated against her. Respondent contends that the total number of vacation days accrued by an employee would not be checked unless or until the employee sought clarification or severed her employment, and claims that Miller did both. I disagree. Insofar as the request is concerned, not only Miller testified that it was normal procedure for the payroll clerk to check the employee's time, but also Ulrich, on direct examination, stated, "Phyllis [his secretary] had reviewed her [Miller] vacation entitlement to make sure that she had those four days coming to her, which is the normal practice." As for Respondent's contention that, if Miller had not severed her employment by resigning effective April 28, the vacation day determination would never have been made, a review of the uncontroverted evidence reveals that Miller was advised of the vacation day determination 6 days *before* she resigned. As stated above, Miller was advised by the payroll clerk on April 21, and Miller's letter of resignation is dated April 27, date-stamped "Received, Personnel Department, Apr. 29, 1980."

It is, of course, well settled that an employer violates Section 8(a)(3) and (1) of the Act when it takes adverse action against employees, whether by discharge or diminution of benefits, or worsening of working conditions, in retaliation for engaging in protected union conduct. *Jack August Enterprises, Inc.*, 232 NLRB 881 (1977). As stated above, in determining whether a given allegation of discriminatory conduct has merit, the Board applies the following test:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [*Wright Line, a Division of Wright Line, Inc., supra*, 251 NLRB at 1089.]

I find that the General Counsel has made a sufficient *prima facie* showing, and that Respondent has failed to rebut it. Under the circumstances, I conclude that the action taken by Respondent in denying Miller the extra vacation day was not for the purpose of rectifying its records, but was in retaliation for Miller's support of the Union and, therefore, violative of Section 8(a)(3) and (1) of the Act.

We come now to the three allegations relating to statements made by Respondent's supervisory personnel. The first incident complained of is alleged to have taken place on January 11, the day after Dawson was discharged. Saleeby testified that, on the morning of January 11, Ulrich went from aisle to aisle in the chemistry laboratory telling the employees that Rodzenko wished to meet with them to clarify the Dawson discharge; that when the employees gathered together that morning, Rodzenko told them that Dawson was discharged for engaging in a solicitation that was against hospital policy; that he, Rodzenko, had reason to believe that "the solicitation was for a union and as you know you all have the right to look at the union but we are not going to stand by and allow employees to tweak our noses." Rodzenko then said, "naturally, we will do everything in our power to keep the union out." Although Rodzenko was called by Respondent to testify on other matters, he was not questioned with regard to these statements, and Saleeby was not cross-examined on this incident. I, therefore, credit Saleeby, and, in light of my finding, *supra*, that Dawson's discharge was violative of the Act, I find that Rodzenko's remarks, which I accept to be a follow-up of the Dawson incident, were threats to the employees regarding any efforts they might engage in to seek union representation. Under the circumstances, I find that Respondent violated Section 8(a)(1) of the Act by the remarks made by Rodzenko on January 11.

A regularly scheduled meeting of the employees in the radiology department was held on January 31, and Les Marshall, its manager, addressed the employees. According to Tomel, Marshall advised the employees that he was aware of the fact that the Union was trying to organize the employees but that the employees must understand that things would not be the same if the Union represented the employees. Specifically, Marshall cited the discretionary powers he had to overlook employee error, tardiness, and improper dress of employees when there is no union present, but that he would not have that power if a union represented the employees. Marshall further stated, according to Tomel, that Michael Rodzenko, the Hospital's chief administrator, was opposed to a union and Marshall felt that Rodzenko would never sign a contract with the Union that called for a pay raise.

Marshall testified that, in response to an employee's question regarding bereavement benefits, a discussion about unions developed at that meeting, and Marshall told the employees that, from his prior experience at another hospital, everything is predicated on the contract that is negotiated; that it took three decisions over a period of more than 2 years before a union was voted in, and that the employees received no increase in salary during that time; that, after the contract was signed,

[43] The dates requested were April 23-25 (Wednesday-Friday) and April 28 (Monday).

[44] See Resp. Exh. 7.

[45] No constructive discharge is alleged by the General Counsel and when asked specifically on the record by the Administrative Law Judge, the General Counsel assured the court that it was not contending that a constructive discharge occurred.

there was stricter observance regarding worktime and proper attire.

Although Respondent admits that Marshall advised the employees of the possibility of stricter enforcement of company rules and working conditions once a union represented the employees, it contends that such remarks were protected by Section 8(c) of the Act.[46] I disagree. Although I am aware of the fact that the meeting of January 31 was not specifically held to discuss the existing union situation at the Hospital but rather was a regularly scheduled business meeting, I am of the opinion that management seized upon the opportunity to attempt to discourage employees from joining up and assisting the Union. As stated above, Respondent was well aware of the Union's organizational campaign on January 31. Once given the opportunity, Respondent, through Marshall, attempted to disenchant the employees by impliedly threatening that it would change existing practices with the advent of the Union. I find that such remarks fall outside the protection of Section 8(c) and are violative of Section 8(a)(1) of the Act.[47]

The General Counsel further alleges that, on February 19, Rodzenko conducted a regularly scheduled monthly meeting of the staff, attended by one representative from each department, at which Rodzenko informed the employees that it would be futile for them to select the Union as their representative. The basis for the allegation lies in the testimony of employee Virginia Roth[48] who attended the meeting. Roth referred to the meeting as a regularly scheduled rumor clinic meeting at which employees place questions in a suggestion box, and Rodzenko plucks them out at random and attempts to answer the questions. At this particular meeting on February 19, after answering questions dealing with the Hospital's parking field and building fund, Rodzenko responded to a question regarding Tomel's discharge and then proceeded to describe in detail the process by which unions organize, how an NLRB election is obtained, unit breakdowns in hospitals, and collective-bargaining negotiations. Roth testified that Rodzenko said, "As long as I am at this hospital, there will never be a Union. It will only be unionized over my dead body." According to Roth, Rodzenko also told the employees that shortly after the employees at Syosset Hospital were organized and a union represented them in negotiations, the hospital went bankrupt. Rodzenko is also alleged to have told the employees that, if the Union is voted in, everyone in the unit would have to join the Union.

Rodzenko acknowledged the mode of the meeting and that a question was asked which led him to speak about unions. He admitted giving a dissertation on the process of union organization as stated above, and that he "personally was very much against unionization." When asked on direct examination whether he used the phrase "over my dead body," Rodzenko responded, "I certainly could not specifically say that I said that in so many words. However I can say that it might not be something that I would not use the phraseology." When pressed by his own counsel, Rodzenko said, "I really could not specifically say yes . . . but I could have used the phrase."

Inasmuch as Roth impressed me as a frank and honest witness, and, although I believe that Rodzenko also was an honest witness and sought to the best of his ability to tell the truth as he remembered it, I am convinced, especially in light of Rodzenko's inability to categorically deny it, that Rodzenko did use the phrase "over my dead body" when referring to his acceptance of unionization. To me, the use of such a phrase conveys a sense of futility to the employees that selection of a union to represent them would be to no avail. And, the Board has found that where an employee imparts such a sense of futility to its employees, it constitutes a violation of Section 8(a)(1).[49]

The last statement alleged by the General Counsel to be violative of the Act occurred on May 2. On that day, Bruce Witz, Respondent's director of respiratory therapy and an admitted supervisor, addressed seven employees in the respiratory therapy department at a regular meeting. Several topics, including the Hospital's dinner dance, parking facilities, and vacation schedule, were discussed. Then questions arose regarding the "flyers" that the Hospital and the Union were handing out, and Witz, in response to a question, "What can we expect should a union come in here?" told the employees that he could not tell them what to expect but that he could tell them his experiences with unions at a hospital where he formerly worked. Witz stated that before the union came in at Wyckoff Heights Hospital the staff did not have to punch a timecard, but afterwards timecards were mandatory. He also testified that, prior to the union, he was able to discuss problems with employees on a one-to-one basis, but after the advent of the union, a union representative had to be present during such discussion. Witz stated that this portion of the meeting took only a few minutes and no further questions regarding unions were asked. Aside from eliciting the fact from Witz that putting in timeclocks was the Employer's idea and not the Union's,[50] the General Counsel's evidence adduced at the hearing from its witness, Glenn Siegel, bears a striking resemblance to that stated by Witz, thus requiring no necessary resolution of the evidence presented. Rather, the question to be resolved is whether, as alleged by the General Counsel, the remarks of Witz threatened the employees with more onerous working conditions, in the event a union represented them, in violation of Section

[46] Sec. 8(c) of the Act provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

[47] *Vincent's Steak House, Inc.*, 216 NLRB 647, 649 (1975).

[48] Roth was subpoenaed to testify.

[49] *International Medication Systems, Ltd.*, 244 NLRB 861, 869 (1979). Cf. *Metropolitan Life Insurance Company*, 142 NLRB 929 (1963), wherein an election was set aside when it was found that company supervisors advised employees that the employer would continue his present policies and rules even if "Jesus Christ were representing" the employees. The Board found that such a statement was calculated to convey to the employees "the utter futility of having union representation."

[50] Witz acknowledged that he did not convey this fact to the employees, but that he did tell them that the contract required the employees' time to be documented.

8(a)(1) of the Act. I do not believe so. At most, Witz was telling the employees, in response to a question from one of them, what existed at another hospital as a result of bargaining with a union. As such, Witz was merely conveying to the employees a bit of knowledge that he acquired while being employed elsewhere, and was trying to be responsive to a question. Under the circumstances, I do not find that Witz' remarks, of such short duration during the course of a regular business meeting, constitute a threat of imposing more onerous conditions on the employees, and, therefore, I shall dismiss this allegation in the complaint.[51]

CONCLUSIONS OF LAW

1. Respondent South Nassau Communities Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union, District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, acting through its agents, violated Section 8(a)(1) of the Act by assigning employees to more arduous and less agreeable job tasks, by issuing written reprimands to employees for overstaying their lunch periods, by requiring employees to produce physicians' notes for all future absences, and by refusing to grant its employees the proper number of vacation days, all because said employees joined and assisted the Union for the purpose of collective bargaining.

4. Respondent, acting through its agents, violated Section 8(a)(1) of the Act by warning and threatening employees with reprisals if they joined and assisted the Union, and by expressing to its employees the futility in their adherence to the Union by stating that only "over its dead body" would the the Union succeed.

5. Respondent violated Section 8(a)(3) and (1) of the Act by discharging its employees Helen Dawson and Raymond Tomel on January 10 and February 6, 1980, respectively.

6. Respondent violated Section 8(a)(3) and (1) of the Act by refusing to grant Eiline Miller 1 day of vacation.[52]

7. Respondent did not engage in any other unfair labor practices as alleged.

8. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

As Respondent has been found to have engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily discharged Helen Dawson and Raymond Tomel, and refused to grant Eiline Miller 1 day of vacation, I shall recommend that Respondent be required to make the employees whole for any loss of earnings they may have suffered as a result of the discrimination against them. The loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[53]

The Respondent, South Nassau Communities Hospital, Oceanside, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Assigning employees to more arduous and less agreeable job tasks to induce the employees to abandon their support for the Union or any other labor organization.

(b) Issuing written reprimands to employees for overstaying lunch periods because said employees joined and assisted the Union.

(c) Requiring employees sympathetic to the Union or, any other labor organization, to produce physicians' notes for all future absences.

(d) Refusing to grant the proper number of vacation days to employees who support the Union.

(e) Threatening employees with reprisals if they joined or assisted the Union, or any other labor organization.

(f) Expressing to employees the futility of their adherence to the Union.

(g) Discharging employees because of their activities on behalf of and sympathies for the Union, or any other labor organization.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

(a) Offer to Helen Dawson and Raymond Tomel immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights previously enjoyed, and make them whole for any loss of pay or other benefits suffered by reason of the discrimination against them in the manner described above in the section entitled "The Remedy."

(b) Pay Eiline Miller for 1 day of vacation plus interest as set forth above in the section entitled "The Remedy."

[51] *Dixon Distributing Company*, 211 NLRB 241, 243 (1974); *Island Holidays, Ltd. d/b/a Coco Palms Resort Hotel*, 208 NLRB 966, 967 (1974).

[52] But for the action of Respondent in denying Miller the fourth vacation day, it can be assumed that Miller would have been an employee on April 28, and therefore entitled to be paid for that vacation day.

[53] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Oceanside, New York, place of business copies of the attached notice marked "Appendix."[54] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[54] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."